BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES AREND Claimant	)	
VS.	)	
INK CYCLE, INC. Respondent	)	Docket No. 1,027,319
AND	)	
HARTFORD UNDERWRITERS INS. CO. Insurance Carrier	)	

ORDER

Respondent requested review of the October 22, 2008 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on January 21, 2009.

APPEARANCES

Michael R. Lawless, of Lenexa, Kansas, appeared for the claimant. Patricia A. Wohlford, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

At oral argument, the parties agreed that the sole issue to be determined in this appeal is whether claimant's accident is compensable under the Kansas Workers Compensation Act in light of the provisions of K.S.A. 44-508(f). Respondent no longer contests the ALJ's conclusions or findings of fact with respect to timely notice of the claim and the nature and extent of claimant's impairment. The parties agree that if this claim is found compensable, the Award should be affirmed in its entirety.

ISSUES

The ALJ concluded that claimant's slip and fall in the parking lot area occurred on respondent's "premises" and therefore was a compensable injury. Respondent has appealed this conclusion alleging that it did not have the requisite control over the parking lot and therefore, the "going and coming" rule precluded claimant's claim. Claimant contends that the ALJ's analysis that this claim was analogous to the facts in *Rinke*[1] is sound and that the Award should be affirmed.

The determinative issue for this appeal is whether claimant's accident occurred on respondent's "premises" or an area over which respondent exercised a sufficient degree of control such that it should be treated as respondent's premises.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Appeals Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2] The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

---

[1] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

[2] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

However, K.S.A. 2004 Supp. 44-508(f) excludes those injuries arising out of and in the course of employment when they occur -

> . . . while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.[6]

This is commonly known as the "going and coming" rule. The legislature's rationalization for this rule is that while on the way to or from work, the employee is exposed to the same risks or hazards as the general public. Thus, those risks are not causally related to the employment.[7]

> An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[8]

The "premises" rule creates an exception to the "going and coming" rule where the employee is on the employer's premises even if the employee is on his or her way to or from work. The dispute in this mater centers around the parking garage and whether the top floor of that garage can be construed as respondent's "premises".

---

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] K.S.A. 2004 Supp. 44-508(f).

[7] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

[8] K.S.A. 2004 Supp. 44-508(f).

The Kansas Supreme Court has addressed the going and coming rule and the premises exception in two fairly recent cases. In *Rinke*, the claimant was injured while walking in a parking lot adjacent to the Bank of America, her employer's building. The parking lot in *Rinke* had 757 parking spaces, of which 737 were "reserved spaces" for Bank employees only. The remaining 20 spaces were reserved for employees of Wesley Occupational Services, the other tenant in the bank building. According to the lease agreement rider, the reserved spaces represented by the "reserved parking permits" would at all times be located within an area of the lot designated for use solely by the Bank. There was no walk-in traffic as the only activity in the building, other than the Bank and Wesley, was an ATM on the first floor. The Bank also had the right to install and maintain a drive-up ATM facility, at the bank's expense in an area along the lot's eastern edge.

The claimant, in *Rinke*, was injured as she approached her car after exiting the building using the only door authorized for anyone to exit and enter the building. In construing the "premises" exception, the Court in *Rinke* noted that precedent required the employer to exercise "control" of an area in order for the place to be part of the employer's premises.[9] The Court determined that Rinke was injured on the Bank's premises because: (1) the parking lot was adjacent to the building where she worked; (2) the Bank leased a substantial portion of the building and the parking lot; (3) the Bank was allocated a certain portion of the lot; (4) the Bank specifically requested her to park in the allocated spaces; and (5) she was injured in that designated area of the lot leased by the Bank.

Some years earlier the Kansas Supreme Court also considered the "going and coming" rule and the "premises" exception in *Thompson.*[10] In *Thompson*, the claimant was furnished parking in a public parking garage across a public street from the office building in which she worked. On the date of accident, the claimant went to the fourth floor of the garage, crossed the public street in an overhead walkway and took the elevator to the eighth floor of the building. As she exited the elevator, she fell, injuring herself. Neither the elevator, the parking garage, nor the building in which the claimant worked were owned, controlled or maintained by her employer, although the firm did pay for the claimant's parking as part of her employment contract. The Kansas Court of Appeals, in *Thompson*, construed the Kansas cases to,

> . . . indicate that Kansas narrowly construes the term "premises" to be a place controlled by the employer or a place where an employee may reasonably be during the time he or she is doing what a person so employed may reasonably do during or while the employment is in progress.[11]

---

[9] *Rinke*, 282 Kan. 746 at 753.

[10] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[11] *Id.* at 39, citing *Thompson v. Law Offices of Alan Joseph*, 19 Kan. App. 2d 367, 373-374, 869 P.2d 761 (1994).

The Kansas Supreme Court found the Kansas Court of Appeals' construction of the term "premises" in the *Thompson* case to be accurate.

Kansas case law requires control by an employer in order for an area to be part of the employer's premises for purposes of the "premises" exception to the "going and coming "rule.[12] The Court in *Thompson* discussed the "proximity" or "zone of employment" rule but refused to adopt such a rule for Kansas.

What can be gleaned from these two cases is that while the courts were initially reluctant to expand the concept of an employer's premises beyond the physical walls of the office specifically leased and rented for the employer's business purposes, more recently they have been willing to expand the concept of "premises" beyond those physical walls to encompass exterior areas, such as parking lots, *when those areas are used primarily by the employer's employees and particularly when the building and the parking lot or structure is owned by the same entity*.

Both *Rinke* and *Thompson* discuss in detail the joint ownership of the respondent's building and the parking lot by the same entity. Both consider cases from other jurisdictions where joint ownership of the building and the parking lot leased to and used by the respondent is considered significant in determining "premises". The Court in *Thompson* found no evidence that the owner of the building where the employer rented office space also owned the public parking garage where the claimant parked her car. The Court in *Rinke*, after discussing this finding, went on to hold "[i]n our view, this distinction includes a significant difference".[13] The Court went on to hold that the cases which involved joint ownership of both respondent's building and the parking lot involved "a much more substantial landlord and employer tenant relationship covering employee parking existed than in *Thompson*".[14]

As specifically noted by the ALJ and just like Rinke, the resolution of this claim turns upon a single fact: whether claimant was injured on respondent's "premises". At the time of the claimant's accident his employer was the only tenant in the entire building. The building and the parking area were owned and leased by the same entity. Respondent's employees were the primary users of the parking lot, although there might have been as many as 10-20 customers that might visit the building on any given day.[15] Nonetheless,

---

[12] *Id.* at 40.

[13] *Rinke*, 282 Kan. 746 at 757.

[14] *Id.*

[15] Respondent suggests that because respondent leases only 25 percent of the square footage available in the *entire office park* that this factual scenario is not analogous to *Rinke*. The Board disagrees. There is nothing in the case law that suggests that the factfinder should look beyond the building at issue in

respondent had hundreds of employees that used the parking lot on a daily basis. Maintenance was provided by the landlord but the uncontroverted evidence establishes that the lease between respondent and the landlord was a "pass thru" lease which means that the tenant ultimately bears the cost of those expenses. In fact, respondent had entered into an agreement with the landlord to construct an additional parking structure. The cost of this project would initially be borne by the landlord but the costs were to "pass thru" to respondent and paid in installments along with the monthly rental cost. There are common areas that were maintained by the landlord, including the parking areas. But these were all areas utilized by respondent's employees in their daily work activities. And while there is some suggestion in the record that employees of tenants from other buildings *might* have parked in this parking area, that alone is not persuasive on the issue of whether this parking lot constituted respondent's "premises" for purposes of workers compensation.

When all the facts were considered, the ALJ concluded that claimant sustained an injury on respondent's "premises". The Board agrees with this conclusion. Claimant's accidental injury is not precluded by the "going and coming" exception contained within K.S.A. 2004 Supp. 44-508(f).

Pursuant to the parties' stipulations, the ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 22, 2008, is affirmed in all respects.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant and his attorney fee request to the ALJ for approval.

---

the pending litigation and to the entirety of the landowner's holdings as respondent suggests here.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant
Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge